Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-636

In The
Supreme Court Of The United States
October Term, 1985

JANICE MARIE NYFLOT,

Appellant,

vs.

MINNESOTA COMMISSIONER OF PUBLIC SAFETY
Appellee.

On Appeal From The Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether the court below properly upheld the Minnesota Implied Consent Statute against the Constitutional challenge that it violates the United States Constitution by prohibiting D.W.I. arrestees from communicating with counsel prior to blood alcohol testing?

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No. _____

IN THE
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JANICE MARIE NYFLOT,

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vs.

MINNESOTA COMMISSIONER OF PUBLIC SAFETY,

Appellee.

On Appeal from the Minnesota Supreme Court

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, Janice Marie Nyflot, files this statement of the basis upon which the Supreme Court of the United States has jurisdiction to review the order entered by the Minnesota Supreme Court in

this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court appears at 369 N.W.2d 512 (Minn. 1985) is included herein as Appendix A (A-1).

In addition, the opinion of the Minnesota Court of Appeals appears at 365 N.W.2d 266 (Minn.App. 1985) and is included herein as Appendix B (B-1).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to rescind the revocation of the appellant's driver's license under authority of Minnesota Statutes 169.123 and the United States and Minnesota Constitutions. The order of the Minnesota Supreme Court was entered on June 11, 1985. The petition for rehearing was denied on July 11, 1985. A timely notice of appeal to this court was filed on September 10, 1985, in the Minnesota Supreme Court. The jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1257.

In the court below, the appellant called into question the validity of the Minnesota Implied Consent Statute on grounds of its being repugnant to the Constitution of the United States. The Minnesota Supreme Court decided the

question in favor of the validity of the statute against this federal constitutional challenge. Cases that sustain the jurisdiction of this court include: Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct 1813, 60 L.Ed.2d 336 (1979); Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 rehearing denied 404 U.S. 876, 92 S.Ct. 26, 30 L.Ed.2d 124 (1971); Warren Trading Post Co. v. Arizona State Tax Commissioner, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965).

QUESTIONS PRESENTED

I. Whether the court below properly upheld the Minnesota Implied Consent statute against the constitutional challenge that it violates the United States Constitution by prohibiting D.W.I. arrestees from communicating with counsel prior to blood alcohol testing?

STATEMENT OF THE CASE

Janice Nyflot was placed under arrest for driving while under the influence of alcohol in Freeborn County, Minnesota at approximately 1:36 a.m on the morning of September 23, 1984 by an officer of the Freeborn County Sheriff's Department. Within moments after she was arrested Ms. Nyflot demanded to speak with an attorney but was not allowed to do so by the police officer.

Ms. Nyflot was then taken to the Freeborn County Law Enforcement Center where she waited until she was read the Implied Consent Advisory pursuant to Minn. Stat. Section 169.123 (1984) at approximately 2:32 a.m. (one hour after her intitial request to contact an attorney). Specifically, Ms. Nyflot was then advised that after submitting to testing she had the right to consult with an attorney and to have an additional test made by a person of

her own choosing. Upon completion of this rendition of the advisory, she informed the police officer that she would not take the test or do anything further without speaking with an attorney. She was informed again by the police officer that the terms of the Implied Consent Statute did not permit her to speak with an attorney prior to her decision regarding whether she would submit to testing. The statutory provision according to which Ms. Nyflot was being advised and which is at issue in this case reads verbatim as follows:

> "... that after submitting to testing, the person has the right to consult with an attorney and to have additional tests made by a person of his own choosing; (Minn. Stat. section 169.123, subd. 2(b)(4) contained in Volume 12A Minnesota Statutes Annotated.)

At 2:45 a.m., thirteen minutes after the Implied Consent Advisory was read, the police officer declared Ms. Nyflot to have

refused the test. At that point the telephone was made available to her and she was allowed to speak with her attorney by telephone.

At 3:00 A.M., immediately after speaking with her attorney, Ms. Nyflot informed the police officer that she would be willing to take the test. At that point, however, the police officer informed her that it was too late and that she would no longer be allowed to take the test as she was deemed to have refused it. The officer then issued a notice of revocation on the basis that Ms. Nyflot had refused to submit to testing and her driver's license was revoked for a period of one year.

In the trial court, the appellant's attorney argued that under Minnesota Statutes as interpreted in Prideaux v. State, Department of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976), the

appellant had a limited right to call an attorney before deciding whether to take the test, and that in any event she had a limited right to counsel in this situation under the Sixth Amendment to the United States Constitution. The trial court rejected these arguments and sustained the revocation.

On appeal to the Minnesota Court of Appeals, the appellant argued that she had a limited right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution. A unanimous three judge panel of the Minnesota Court of Appeals, Chief Judge Peter Popovich presiding, reversed the trial court, holding that a limited right to an attorney in this circumstance attaches prior to submitting to testing.

The Minnesota Supreme Court reversed the Court of Appeals in Nyflot v.

Commissioner of Public Safety, 369 N.W.2d 512 (Minn.1985). A majority reversed its earlier decision in Prideaux v. State, Dept. of Public Safety, supra, holding that there was no Constitutional right to counsel in the implied consent situation. The Court presented its reasoning as follows: A majority of four justices held that there is no constitutional right to counsel implicated by denying the arrestee's request to consult with her attorney. Two justices concurred in that result while two justices dissented. Justice Scott acknowledged the unfairness of the result, but determined the question to be a Fourth Amendment matter controlled by the United States Supreme Court's decision in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The special concurrence of Justice Kelley, on the other hand, was based on his

view that since the license revocation was civil in nature the constitutional right to counsel could not be implicated. He therefore deemed the constitutional discussion in both majority and dissenting opinions to be premature.

The majority opinion reasoned essentially that Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) prevents attachment of the right to counsel prior to the formal commencement of prosecution by indictment or complaint. The majority opinion predicted that United States Supreme Court, if presented with this question, would be: "... unlikely to find other situations requiring a triggering of the right to counsel before the formal initiation of a criminal prosecution." (Nyflot at 516.)

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that a state statute in this case has been held to be valid against a Federal Constitutional challenge. The substantial nature of these questions has been discussed at great length in the record before this court. The appellant would offer the following comments:

1. The court below in its reliance on Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), ignores the unique circumstances in which the right to counsel arises in this case. While it is true that Kirby v. Illinois held that the right to counsel did not attach until judicial proceedings are formally commenced, in the DWI situation the traffic citation is the equivalent of a complaint since it is a summons to appear in court to

answer the charge. Its issuance is the point at which the right to counsel would attach pursuant to Kirby. Under the Kirby analysis formal proceedings are therefore commenced with the issuance of the ticket and thus under Kirby the right to counsel would have attached in this case but for the fact that the police officers elected to delay the process of formal charging, i.e. issuing the traffic citation, until after the chemical test. This delay can be used merely as a means of manipulating the system and avoiding the Sixth Amendment right that would otherwise attach.

There can be little question that the decision whether or not to take the test is a "critical stage" in the driving under the influence proceeding. Indeed, it is the single most critical stage in the proceeding and the one point at which the assistance of counsel is most helpful, as

is amply demonstrated by the facts of this case. The consequences of a refusal of testing cannot be corrected because the motorist will never again have the opportunity to preserve evidence of his or her innocence. Additionally, the defendant is being made to choose what type of evidence will be used against her at her criminal trial. If she takes the test it will be a test result -- if she refuses, her refusal will be used against her by the state in an attempt to show her guilt. South Dakota v. Neville. This court has repeatedly emphasised that the core purpose of the right to counsel is to assure aid to the accused, like Janice Nyflot, who is confronted with prosecution and immersed in the intricacies of the criminal law. Thus extension of the right to counsel has been made to critical pre-trial stages. Kirby itself reasons that it is the solidification

of the adverse positions of government and accused that triggers the right to counsel. Where those positions have become thus solidified, as they were in this case at the time of the test request, the right to counsel should attach.

The Implied Consent Statute is intended to secure additional evidence of intoxication. The police officers' refusal to allow testing in this case thwarted the will of the legislature, and hence the will of the people, by refusing to collect evidence that was made readily available by Janice Nyflot and which the state statute commanded the officer to collect, if possible. It was only by a technical interpretation of the statute by the officer that the state was deprived of the test sample it sought. It was then only by a technical interpretation of Kirby by the Minnesota Supreme Court that the price to

Ms. Nyflot of her short communication with her attorney was the loss of her driver's license for one year. The cost to the state was the loss of evidence that the implied consent statute was aimed at securing.

2. The Minnesota Supreme Court did not take into account the only Federal Court pronouncement on this question which was rendered in the case of Heles v. South Dakota, 530 F.Supp. 646, (D.C.S.D.1982) (vacated as moot, death of appellant, 682 F.2d 201 8th Cir 1982). The Heles court, while recognizing the danger that drunk driving presents to the general public, nonetheless held that due process demands that an individual arrested for DWI have a limited right to speak with an attorney prior to deciding whether to submit to testing. The Heles case, representing the only constitutional analysis by the federal

judiciary of the right to counsel at the time of testing for the presence of blood alcohol, should have been considered by the Minnesota Supreme Court in rendering its decision.

3. The state's argument that the result in this case is justified because of some general potential for attorneys to obstruct the testing process ignores both the facts of this case, and this court's rejection in Miranda of the view that an attorney is a menace to law enforcement.

But in addition, when submission to testing became mandatory under the Minnesota Implied Consent statute in question, no attorney could thereafter ethically advise a suspect not to take the test without counseling disobedience of the law. Any lingering doubt concerning the ethical obligation of an attorney in this circumstance was put to rest by the Minnesota

Supreme Court's pronouncement in footnote three of the Nyflot opinion where the court indicated that an attorney could not hereafter ethically advise a motorist to refuse testing.

Thus as recognized by the court in its opinion, the decision made by Ms. Nyflot as one "... for which the advice of counsel arguably could be useful" (Nyflot at 517). This statement is more true than the Supreme Court apparently recognized as certainly both the statutory intent of the legislature and the driver's rights would best have been served in this case by the timely advice of counsel. All of this would have been accomplished, in the words of dissenting Justice Lawrence Yetka: "... within the confines of the law and the constitution and without demeaning the legal profession." (Nyflot at page 519, Yetka dissenting.)

4. Following this court's decision in South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), the suspects refusal of testing is now admissible in the criminal prosecution of a D.W.I. case. The Neville decision held that no Fifth Amendment interest is implicated by the admission of such evidence. By deciding that evidence of refusal is admissible, this court has left the D.W.I. suspect in the situation of deciding which of two types of evidence, test evidence or evidence of refusal of testing, will be introduced in evidence against him at trial. Following the Minnesota Supreme Court's decision in Nyflot, the Minnesota driver must make that crucial decision without the advice of counsel.

Even though a person is guaranteed that he need not stand alone against the

state at any stage of the prosecution, formal or informal, in court or not, where counsel's absence might derogate from his right to a fair trial, United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967), a driver accused of D.W.I. is, following Nyflot, nonetheless asked to make the single most important evidentiary decision without the assistance of counsel. And since he is supposedly required to submit to testing, this apparent choice is not so much a decision as a pitfall.

Following Neville, the refusal of testing is presumed to be probative evidence of guilt. But this can only be truly the case if the refusal is an informed one. Where the refusal is merely the product of confusion or fear, as it will often be, it carries no probative value to the fact finder. The only way a

defendant can respond to this lack of probative value, however, is to testify in his own defense, explaining why he refused testing. Thus while Neville held that the refusal of testing was nontestimonial and therefor not within the purview of the Fifth Amendment, the situation in which a defendant is forced to testify clearly is. The ramifications of refusal of testing are therefor such that the assistance of counsel is necessary prior to testing in order to preserve the fairness of the subsequent trial.

5. Although not yet addressed by this court, the statutory implied consent schemes of most states have created an unmanageable jurisprudence as drivers are confused by knowledge of their rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), with which they are familiar, and their rights under

the implied consent statute, which they are being advised of for the first time. The average citizen, aware of his or her Miranda rights, is confused when advised under the implied consent statute that there is no right to consult an attorney prior to taking the test. The suspect realizes that this is the single most important decision he or she will make, and has some difficulty understanding why, if there is a right to an attorney, that right should only attach when it can no longer be of value.

The clarity of the Miranda rule, and the law enforcement routines flowing from it, are undermined by the present confusing statutory implied consent schemes. While this court has held that a police inquiry of whether or not an arrested motorist will submit to a blood alcohol test is not an interrogation within the meaning of

Miranda, South Dakota v. Neville, 459 U.S. 460, 103 S.Ct. 916, 74 L.Ed.2d, 748 (1983), the court has not yet addressed the Sixth Amendment implications in the same situation, as noted above. It is clear that in the DWI arrest situation the suspect's "freedom of action is curtailed to a 'degree associated with formal arrest'", and the Miranda safeguards are thus applicable. Berkemer v. McCarty U.S. 104 S.Ct. 3138, 81 L.Ed.2d (1984). It is thus clear that the Miranda warning must be given prior to any custodial interrogation. The remaining question, then, is what to do about the confusion that will necessarily arise in the mind of a motorist who has first been given a Miranda warning or is aware of his or her rights under Miranda and who then is told that he or she has no right to consult with an attorney until after taking a test.

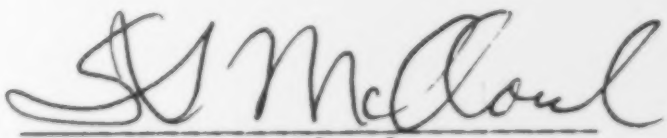
Some state courts presently place the responsibility upon the police officer to resolve this confusion for the motorist. Standish v. Dept. of Revenue, M.V.P.D., 683 P.2d 1276 (Kan. 1984). Thus in removing the attorney from the picture, these statutory schemes and the decisions which have construed them, have placed the police officer in the role of legal advisor while removing the attorney from that same role. The police officer is given the delicate task of explaining the Miranda rights and then explaining the inapplicability of the right to counsel when the accused is asked whether or not to submit to testing. Other cases have held that the police officer is under no affirmative obligation to clarify the nature of the defendant's right to counsel under Miranda in the context of the implied consent law. The better approach would be to allow consultation with an

attorney so long as the test is not unreasonably delayed thereby.

As the facts of this case amply demonstrate, there is no reason to deny a limited right to counsel since the advice of an attorney will aid the state in securing the test, while at the same time harmonizing the implied consent statutes with this Court's decision in Miranda.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution, and that the resolution of these issues is necessary to harmonize the law.



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NOTICE: MEDIA AND COUNSEL ARE PROHIBITED FROM MAKING THIS OPINION OR ORDER PUBLIC PRIOR TO 3:00 P.M. ON THE FILE DATE APPEARING BELOW

NOTICE: MEDIA RELEASE TIME IS TUESDAY, 3:00 P.M.

STATE OF MINNESOTA

IN SUPREME COURT

C5-84-2030

Court of Appeals

Amdahl, C. J.
Concurring Specially, Scott, J.
Concurring Specially, Kelley, J.
Dissenting, Yetka, J.
Wahl, J.

Janice Nyflot,

Respondent,

vs.

Filed June 11, 1985
Wayne Tschimperle
Clerk of Appellate Courts

Commissioner of Public Safety,

Petitioner.

S Y L L A B U S

Driver who is arrested for driving while under the influence of alcohol has no right, statutory or constitutional, to consult with counsel before deciding whether to submit to chemical testing under the implied consent law.

Reversed.

Heard, considered and decided by the court en banc.

O P I N I O N

AMDAHL, Chief Justice.

In Nyflot v. Commissioner of Public Safety, 365 N.W.2d 266 (Minn. App. 1985), the Court of Appeals reversed an order of the trial court sustaining the revocation of Janice Nyflot's driver's license for refusal to submit to chemical testing under Minn. Stat. § 169.123 (1984), the implied consent law. The Court of Appeals ruled that drivers

arrested for DWI have a limited right under Minn. Stat. § 481.10 (1984) to consult with an attorney before deciding whether to submit to chemical testing, notwithstanding a 1984 amendment to section 169.123 signifying a legislative intent to take away that right. We granted the commissioner's petition for review. Holding that a driver arrested for DWI has no right, statutory or constitutional, to consult with counsel before deciding whether to submit to chemical testing, we reverse the Court of Appeals and reinstate the decision of the trial court.[1]

On September 23, 1984, Nyflot was lawfully arrested by sheriff's deputies for DWI and was taken to the law enforce-

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[1] The motion to strike an affidavit from the supplementary brief of the Commissioner of Public Safety is denied.

ment center in Albert Lea. There the deputies read her the implied consent advisory set forth in section 169.123. Specifically, she was told (a) that Minnesota law required her to take a test to determine if she was under the influence of alcohol or a controlled substance, (b) that if she refused, her right to drive would be revoked for a minimum of 1 year, (c) that if she took a test and the results indicated that she was under the influence of alcohol or a controlled substance, she would be subject to criminal penalties and her right to drive could be revoked for a minimum of 90 days, (d) that "after submitting to testing," she had the right to consult with an attorney and to have additional tests made by a person of her own choosing, and (e) that if she refused to take a test, the refusal would be offered

in evidence against her at trial. Nyflot insisted that she be permitted to call her attorney before deciding, but the deputies explained to her that the law had changed and that she did not have that right. Nyflot at first agreed to take the test, and one of the deputies began to set up the Breathalyzer machine. Then, after the machine was ready, Nyflot said she would not take the test. One of the deputies told her that that was a refusal, and the other deputy began taking down the machine. Nyflot then was permitted to call her attorney. After talking with her attorney, she said that she would take a test. One of the deputies told her that she had already refused and that she could not change her mind.

In the trial court, Nyflot's attorney argued that (1) under Minn. Stat. §

481.10 (1984), as interpreted in Prideaux v. State, Dept. of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976), Nyflot had a limited right to call her attorney before deciding whether to take a test and that the 1984 amendment changing the implied consent advisory did not change that right, and (2) in any event, she had a limited right to counsel in this situation under the Sixth Amendment of the Federal Constitution. The trial court rejected these arguments and sustained the revocation.

On appeal to the Court of Appeals, Nyflot argued (1) that the 1984 amendment did not effectively create an exception to section 481.10 in implied consent cases or change Prideaux and (2) if it did, the legislation violated the Sixth Amendment, the due process clause, and the equal protection clause of the

Federal Constitution.

The Court of Appeals ruled that although the legislature apparently intended to take away a driver's limited right to counsel before testing, amending the implied consent advisory was not an effective way to do it. The court also made clear in its opinion that any attempt by the legislature to take away the limited statutory right to counsel recognized in Prideaux probably would violate a driver's Sixth Amendment right to counsel.

We first addressed the issue of right to counsel in implied consent cases in State v. Palmer, 291 Minn. 302, 191 N.W.2d 188 (1971), and held that a driver has no constitutional right to consult with counsel before deciding whether to submit to chemical testing. Then, in Prideaux, supra, we construed Minn. Stat.

§ 481.10 as giving a driver arrested for DWI a limited right to consult with counsel before deciding whether to submit to chemical testing. Section 481.10 provides:

> All officers or persons having in their custody a person restrained of his liberty upon any charge or cause alleged, except in cases where imminent danger of escape exists, shall admit any resident attorney retained by or in behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify any attorney residing in the county of the request for a consultation with him. Every officer or person who shall violate any provision of this section shall be guilty of a misdemeanor and, in addition to the punishment prescribed therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.

We stated, "The importance of a driver's license and the binding decisions which must be made by the driver asked to

submit to chemical testing make the chemical-testing process a 'proceeding' within the meaning of § 481.10 before which consultation with counsel is to be accorded." Prideaux, 310 Minn. at 419, 247 N.W.2d at 393. We added, however, that if the commissioner was correct in his contention that the implied consent statute forbade even limited consultation with counsel before chemical testing, then that statute, which was later and more specific in its scope, would control. Id. Finding no evidence of such a legislative intent, we concluded that a driver arrested for DWI had a limited right under section 481.10 to consult with counsel before deciding whether to submit to chemical testing. Id. at 419-21, 247 N.W.2d at 393-94.

In 1978, the legislature signified its agreement with Prideaux by expanding

the implied consent advisory. Before the 1978 amendment, the driver was informed simply that his right to drive would be revoked if he refused to take a test and that he had a right to have additional tests made by a person of his own choosing. Minn. Stat. § 169.123 (1976). The amendment expanded the advisory to inform the driver as follows:

> (1) that if testing is refused, the person's right to drive will be revoked for a period of six months; and
>
> (2) that if a test is taken and the results indicated that the person is under the influence of alcohol or a controlled substance, the person will be subject to criminal penalties and the person's right to drive may be revoked for a period of 90 days; and
>
> (3) that the person has a right to consult with an attorney but that this right is limited to the extent that it cannot unreasonably delay administration of the test or the person will be deemed to have refused the test; and

> (4) that after submitting to testing, the person has the right to have additional tests made by a person of his own choosing.

Act of April 5, 1978, ch. 727, § 3, 1978 Minn. Laws 788, 792-93.

In 1983, the legislature added a warning that if the driver refused to take a test, the refusal would be offered in evidence against him at trial. Act of June 9, 1983, ch. 306 § 5, 1983 Minn. Laws 1742, 1744-45.

The 1984 changes in the advisory involved inserting new advice to the effect that Minnesota law "requires" the person to take a test, increasing the 6-month revocation period to 1 year, removing the advice to the effect that the driver has a limited right to consult with an attorney prior to testing, and changing the advice relating to additional testing so that it now informs the driver that he has a right to consult

with an attorney "after submitting to testing" and to have additional tests made by a person of his own choosing. Act of May 2, 1984, ch. 622, § 10, 1984 Minn. Laws 1541, 1546-47.

The Court of Appeals, agreeing with Nyflot, concluded that the 1984 amendment of the implied consent law did not effectively take away the limited right to counsel that we recognized in Prideaux. This conclusion overlooks our statement in Prideaux that if the implied consent statute forbade even limited consultation with counsel before chemical testing, then that statute, being later and more specific in its scope, would control. Because the legislature originally signified its adherence to the Prideaux ruling by amending the advisory to include a limited right to counsel prior to testing, it makes sense that the

legislature intended to abandon the Prideaux right to counsel by later amending the advisory to remove this right. Concluding that the 1984 amendment controls, we hold that a driver arrested for DWI no longer has even a limited statutory right to consult with counsel before deciding whether to submit to chemical testing.

However, Nyflot argues, and the Court of Appeals apparently agreed, that she has a constitutional right to consult with counsel in this context. Our decision in Prideaux did indicate, in dictum, that the decision to submit to testing was arguably a "critical stage" of the prosecution. 310 Minn. at 411-14, 247 N.W.2d at 389-91. At that time there was still some dispute as to when a prosecution was commenced for purposes of attachment of the Sixth Amendment right

to counsel. Kirby v. Illinois, 406 U.S. 682 (1972), which concluded that the Sixth Amendment right to counsel did not attach until judicial proceedings are formally commenced (by indictment, complaint or substitute for complaint), was a plurality opinion. Since then it has become clear that a majority of the Justices of the United States Supreme Court supports the view espoused by the plurality in Kirby. United States v. Gouveia, 104 S. Ct. 2292 (1984); Estelle v. Smith, 451 U.S. 454 (1981); Moore v. Illinois, 434 U.S. 220 (1977); Brewer v. Williams, 430 U.S. 387 (1977).

Miranda v. Arizona, 384 U.S. 436 (1966), gives a defendant a right to counsel in the case of custodial interrogation even though custodial interrogation occurs before the defendant is formally charged by complaint or

indictment. In a footnote in his opinion in Gouveia, Justice Rehnquist states that the right to counsel in connection with custodial interrogation required in Miranda and Escobedo v. Illinois, 378 U.S. 478 (1964), was the only arguable deviation from the usual rule that the Sixth Amendment right to counsel is not triggered until the commencement of adversary judicial proceedings. 104 S. Ct. at 2298 n.5 ("we have made clear that we required counsel in Miranda and Escobedo in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel."). Thus, it is clear that the Court is unlikely to find other situations requiring a triggering of the right to counsel before the formal initiation of a criminal prosecution.

It is also clear that the right to counsel recognized in Miranda does not apply to the limited questioning of a driver to determine if he will consent to a chemical test. The Miranda right to counsel applies only to "interrogation," which the Court has defined as express questioning or other words or actions by police reasonably likely to evoke an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980). In South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983), the Court made it clear that "in the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda." Of course, if the police arrest (as opposed to temporarily detain) a driver for DWI and interrogate him,

then they must give him a Miranda warning, if the statements are to be admitted in evidence later. Berkemer v. McCarty, 104 S. Ct. 3138 (1984). As a practical matter, it makes sense for police not to interrogate an arrested driver until after completing the implied consent part of the investigation because of the danger that the Miranda warning will confuse the driver. See State, Dept. of Highways v. Beckey, 291 Minn. 483, 487, 192 N.W.2d 441, 445 (1971).

The due process and equal protection arguments advanced by Nyflot are also without merit. Under the due process clause, a defendant has a right to a fairly conducted lineup that is not so unnecessarily suggestive as to create a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409

U.S. 188 (1972). But the right to counsel that a suspect has at a lineup comes from the Sixth Amendment and that right attaches only after judicial proceedings have formally commenced. Moore v. Illinois, 434 U.S. 220, 224-27 (1977). Similarly, due process does not require giving an arrested driver a right to consult with counsel before deciding whether to take a test that the law says he is required to take, particularly where he is properly advised that he is required to take it.

The equal protection argument also has no merit. All arrested drivers--those who can afford counsel and those who cannot--are treated equally. Contrary to what defendant argues, drivers suspected of DWI are not treated differently than suspects of other crimes. The same rule as to the triggering of the Sixtn

Amendment right to counsel applies to all criminal defendants. Further, there is a rational basis for denying drivers permission to consult with counsel before deciding to submit to chemical testing.

As the United States Supreme Court reemphasized in South Dakota v. Neville, 459 U.S. 553, 559 (1983), its decision in Schmerber v. California, 384 U.S. 757 (1966), "clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test."[2] The legislature, therefore, could repeal the implied consent law and direct police officers to administer chemical tests against the suspect's will. Id. The obvious reason the

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[2] Schmerber was reaffirmed even more recently in Winston v. Lee, 105 S. Ct. 1611 (1985), a case upholding a federal district court's injunction against surgical removal of a bullet from the chest of an armed robber.

legislature has chosen to retain the implied consent law is to avoid the violent confrontations which could occur when people are forced to submit to testing. Id. at 559-60. The legislature's decision to let people refuse in the ordinary case and not be forced to take a test does not mean that a defendant has a right to refuse. Even though arrested drivers do not have a right to refuse, they do have an important decision to make, the kind of decision for which the advice of counsel arguably could be useful.[3] But, there being no right under

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[3] An attorney may advise the driver of the consequences of refusal and of the consequences of taking the test and failing it. He also may advise the driver to take the test. He may not ethically advise the driver not to take the test, since the law requires the driver to take the test. In short, what the att rney may tell the driver is what the implied consent advisory tells the driver. Of course, some drivers are more likely to believe the advisory if it comes from an attorney.

the constitution to consult with counsel in this context, the decision whether or not to provide that right is one for the legislature to make. Satisfied that the legislature has clearly and effectively expressed its intent that arrested drivers not be given that right, we reverse the Court of Appeals and reinstate the decision of the trial court sustaining the revocation of Nyflot's license for unreasonably refusing to submit to testing.[4]

Reversed.

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[4] Nyflot's expression of willingness to take the test after she talked with her attorney was an ineffective attempt to avoid the consequences of her refusal. State, Dept. of Public Safety v. Early, 310 Minn. 428, 247 N.W.2d 402 (1976); State v. Palmer, 291 Minn. 302, 308-09, 191 N.W.2d 188, 191-92 (1971)("the testing officers should not be required 'to await the driver's convenience of a different time or place' to submit to the statutory requirement.")

SCOTT, Justice (concurring specially).

Although it seems unfair that Janice Nyflot could not call her attorney for sound and trusted advice when confronted with what she considered questionable advice by the police, it is now clear, after the recent amendment to Minn. Stat. § 169.123, subd. 2, that this is exactly what the legislature intended. Act of May 2, 1984, ch. 622, § 10, 1984 Minn. Laws 1541, 1546. Only a constitutional restriction could overrule this legislative result: that one has the right to consult an attorney only "after submitting to testing." Minn. Stat. § 169.123, subd. 2(b)(4)(1984). It seems clear to me that the constitutional issue has been answered by Schmerber v. California, 384 U.S. 757 (1966), and its progeny. Schmerber says: "The question is squarely presented therefore, whether the

chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure." 384 U.S. at 766-67. The testing for blood alcohol is a Fourth Amendment matter, a search and seizure. There is no constitutional right to consult an attorney before a search is conducted. This issue is therefore resolved by the determination of legislative intent, as discussed by the majority, with whom I agree.

KELLEY, Justice (concurring specially)

I concur in the result reached by the majority, and, accordingly, would reverse the court of appeals. In my view, the majority has correctly decided that the legislature could, and did, amend the implied consent statute to forbid even limited consultation with counsel before chemical testing. The 1984 amendment, being later in time and more specific in scope, supplants the meaning of proceeding as found in Minn. Stat. § 481.10 (1984). See Prideaux v. State, Department of Public Safety, 310 Minn. 405, 419, 247 N.W.2d 385, 393 (1976). Therefore, the Commissioner is not precluded from revoking appellant's driver's license for her refusal to submit to such chemical testing under Minn. Stat. § 169.123 (1984). In my opinion, that should resolve this case,

and no further discussion of the constitutionality of the amendment is necessary for resolution of this appeal.

The court of appeals made clear that in its view any attempt by the legislature to take away the limited right to counsel prior to testing would violate the driver's sixth amendment right to counsel. Before this court, however, Appellant Nyflot advanced additional arguments that due process and equal protection rights under both the state and federal constitutions are violated if a driver arrested for driving under the influence of intoxicating liquor (DWI) is not afforded the limited "right" to pre-testing advice of counsel. Both the majority opinion and the dissent address these issues on the merits.

This case does not involve a criminal prosecution for driving under

the influence of intoxicating liquors. It is a civil action to revoke a driver's license. See Goldsworthy v. State Department of Public Safety, 268 N.W.2d 46, 49 (Minn. 1978); State, Department of Highways v. Beckey, 291 Minn. 483, 486, 192 N.W.2d 441, 444 (1971). The issue before us is not whether, in a criminal DWI prosecution, the state could be precluded on constitutional grounds from introducing evidence of the appellant's refusal, after denial of pre-testing attorney consultation. This case does not demand that we determine the constitutionality of Minn. Stat. § 169.121, subd. 2 (1984) should the state attempt to introduce the test refusal as a criminal DWI prosecution.[1] In this civil action

[1] In a criminal DWI prosecution, Minn. Stat. § 169.121, subd. 2, in appropriate part, provides that "[e]vidence of the refusal to take a test is admissible into evidence in a prosecution under this section***."

it seems patent to me that discussion of constitutional precepts is irrelevant. By its very wording, the sixth amendment to the United States Constitution prefaces the rights therein ensured with the words, "In all criminal prosecutions***." U.S. Const. amend. VI. This license revocation proceeding is a civil, not a criminal action. Likewise, Article 1, Section 6 of the Minnesota Constitution, in assuring assistance of counsel, is prefaced, "Rights of accused in criminal prosecutions." Minn. Const. art. 1, § 6. Moreover, Article 1, Section 7 of the Minnesota Constitution states, in part, "No person shall be held to answer for a criminal offense without due process of law***." Minn. Const. art. 1, § 7. Since the issue raised here is in a civil, not a criminal proceeding, I deem the constitutional discussion in both the

majority and dissenting opinion to be premature, and, more importantly, irrelevant to the issue before the court.

By the 1984 amendment, the legislature has clearly evinced an intention that, in drivers' revocation cases, at least, a driver arrested for DWI no longer has a limited right to consult with counsel prior to deciding whether to submit to testing. Since the driver's revocation action is civil in nature and since the sixth amendment to the United States Constitution and Article 1, Sections 6 and 7 of the Minnesota Constitution have to do only with criminal proceedings, I would reverse the court of appeals.

YETKA, Justice (dissenting).

I respectfully dissent. I fully recognize that drunk driving is a serious national problem which should be dealt with through strict laws and vigorous enforcement. The problem must, however, be combatted within the confines of the law and the constitution and without demeaning the legal profession.

I.

At the outset, it is important to bear in mind what this case is all about. In my opinion, it is not a question of whether one is for or against tougher laws and penalties for drunk drivers nor is it a question of whether a law makes it easier for law enforcement officers to remove drunk drivers from the road. The sole issue in this case is whether a person arrested by the police for

suspected drunk driving has a legal or constitutional right to consult an attorney before deciding whether to submit to chemical testing for alcohol concentration. I would hold that our opinion in Prideaux v. State, Dept. of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976), is still good law and ought to be followed.

The state's argument is something like this:

1. After our decision in Prideaux, more people asked for the right to consult an attorney before submitting to chemical testing than previously.

2. The 1984 Legislature amended the law to no longer require officers to advise people that they have a right to counsel before submitting to tests.

3. The legislature has thus decided that more chemical tests and statistical

data as a result thereof secured from drivers suspected of driving while under the influence are desirable and that a conviction for drunk driving is easier to obtain with such tests.

4. Consulting with an attorney results in fewer tests being undertaken as illustrated by the fact that, prior to the 1984 amendments, 33% refused to take the test whereas, following the amendments, the refusal rate averaged 24%.

5. Therefore, the legislature intends that everyone arrested for suspected drunk driving should be required to take the test before consulting an attorney.

I find such arguments spurious and without support in the record. To the contrary, the facts in the record support the opposite conclusion.

In this state, any person in police custody accused of wrongdoing has a statutory right to consult with an attorney. Since 1887, our statutes have required that:

> All officers or persons having in their custody a person restrained of his liberty upon any charge or cause alleged, except in cases where imminent danger of escape exists, shall admit any resident attorney retained by or in behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify any attorney residing in the county of the request for a consultation with him. Every officer or person who shall violate any provision of this section shall be guilty of a misdemeanor and, in addition to the punishment prescribed therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.

Minn. Stat. § 481.10 (1984). This statute has never been amended. As counsel for the state admitted, the 1984

Legislature was presented several proposals to amend section 481.10 to exclude specifically the implied consent situation, but rejected them all. Today, by limiting the statute's effect, this court has effectively amended the statute without legislative authorization.

The majority's rationale is that by merely changing language about the right to counsel in the implied consent advisory, the explanation of the DWI law read to suspected drunk drivers, the legislature somehow changed the substantive law on right to counsel embodied in a wholely separate statute, section 481.10. In Prideaux, 310 Minn. 405, 247 N.W.2d 385, this court unequivocally held that the right to counsel guaranteed under section 481.10 applies when an allegedly drunk driver is

required to submit to chemical testing.[1] We reached this conclusion in spite of the fact that police officers were not then required to advise an allegedly drunk driver of any right to counsel. Minn. Stat. § 169.123, subd. 2 (1974). In 1978, the legislature did amend the advisory to conform with the requirements of section 481.10 and Prideaux. Act of April 5, 1978, ch. 727, § 3, 1978 Minn. Laws 788, 792-93 (codified at Minn. Stat. § 169.123, subd. 2(b)(3) (1978)). Thus, the fact that an accused person was informed of that right in no way enhanced or diminished the right itself; rather, the advisory only ensured that the person

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[1] Contrary to the state's contention, the 1984 amendment did not make chemical testing mandatory. Chemical testing has been mandatory all along. Compare Minn. Stat. § 169.123, subd. 2 (1974) with Minn. Stat. § 169.123, subd. 2(a) (1984). The 1984 amendment simply changed the advisory to reflect more accurately the substantive law.

would intelligently exercise it. By contrast, the majority would limit the accused's substantive rights because the advisory now misinforms her of her rights.

II.

Chemical testing under the DWI statute is an attempt by the state to seize evidence. Unlike most evidence seizures, however, the person of the accused must be invaded to obtain the evidence either by drawing blood, sampling breath, or collecting urine. When the state seeks to obtain physical evidence from the accused's person, the accused's right to privacy may limit the state's right to collect the evidence. Winston v. Lee, 105 S. Ct. 1611 (1985) (state cannot force defendant to have bullet surgically removed to determine if

it was shot from robbery victim's gun); Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976) (Minnesota recognizes right to privacy; intrusive drugs cannot be administered to nor can surgery be performed on patients in mental institutions without consent.) The United States Supreme Court has already recognized that chemical testing raises privacy issues. Schmerber v. California, 384 U.S. 757 (1966). I agree that the state may require tests under certain circumstances in which the state's interest outweighs the intrusion on the individual's privacy. As Schmerber noted, however, just because the "Constitution does not forbid the States [sic] minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions

under other conditions." Id. at 772. Here, the state has taken that extra step; they have required the test and denied the right to counsel.

Although privacy is "the most comprehensive of rights and the right most valued by civilized men," Olmstead v. United States, 277 U.S. 433, 478 (1928) (Brandeis, J., dissenting), it is not absolute. The government can intrude on one's privacy if the intrusion is reasonable. Reasonableness is determined by balancing the individual's interests against the state's interests.

The individual's interests include, first, "the extent to which the procedure may threaten the safety or health of the individual." Winston v. Lee, 105 S. Ct. 1611, 1617 (1985). Denying access to counsel while requiring a chemical test does not threaten the individual's life

or health. The first factor does not enter into the analysis.

The second factor is "the extent of intrusion upon the individual's dignitary interests***." Id. An intrusion on one's dignity is one which damages "the individual's sense of personal privacy and security." Id. Forcing an individual to accompany police officers to the police station injures a person's dignity. Id. (citing Dunaway v. New York, 442 U.S. 200 (1979)). Under the implied consent law, as interpreted by the majority, the police can not only pluck us from the highway and drag us to the station house, but also hold us incommunicado until we submit to or refuse chemical testing. If forcing an individual to a police station alone is an intrusion on one's dignity, holding someone incommunicado on top of it makes

the intrusion all the more severe. Such are the tactics of a police state, not of a free state respectful of an individual's dignity. I find the majority's interpretation a grave intrusion on the dignity of the individual.

This grave intrusion on an individual's dignity must be weighed against the state's interests. The state claims that denying a right to counsel will decrease the number of refusals to take the chemical test and increase the number of DWI convictions. Even if consultation with an attorney does increase the number of refusals, those who refuse lose their licenses for a year. Minn. Stat. § 169.123, subd. 4 (1984). Either way, the driver is severely punished and the state relatively unharmed. Even without the chemical test, the driver can still be

convicted of driving while intoxicated.

The state presented no evidence that consultation with attorneys in any way affected either the test results or the accused's decision whether or not to take the test. The right to counsel has always been limited so that it does not interfere with chemical testing. Prideaux, 310 Minn. at 421, 247 N.W.2d at 394. A short phone call to an attorney, so that the accused can be apprised of his rights or obligations by a third party, will not take up enough time to affect the accused's blood alcohol concentration significantly. The state presented no authority to support the proposition that consulting an attorney makes the accused more likely to refuse testing. In this case, for example, after consulting with an attorney, Myflot wanted to take the test she had earlier

refused. The fact that the number of refusals has decreased since the new DWI law went into effect more than likely has to do with the doubling of the penalty for refusal from 6 months to a year.

The person suspected of drunk driving is generally an average citizen in a totally new, confusing, and uncomfortable situation. One's dignity, the dignity of a free citizen to determine one's rights and obligations through consultation with a trusted counselor rather than one's accusers, is gravely intruded upon. This grave intrusion is balanced against, at best, a weak and ill-supported state interest. The state has failed to show that the intrusion is reasonable; thus, denying counsel is constitutionally invalid.

III.

The majority argues that the chemical testing is not a critical stage in a criminal proceeding which triggers one's Sixth Amendment right to counsel. I disagree.

While, as the majority points out, it seems that most of the justices on the United States Supreme Court support the rationale of Kirby v. Illinois, 406 U.S. 682 (1972), that the right to counsel does not attach until judicial proceedings are formally commenced, this does not change the fact that the Kirby rationale is shortsighted and arbitrary. This court has long recognized that shortsightedness, as evidenced by our extension of the right to counsel to areas traditionally thought of as civil. Cox v. Slama, 355 N.W.2d 401 (Minn. 1984) (civil contempt hearings); Hepfel v.

Bashaw, 279 N.W.2d 342 (Minn. 1979) (paternity hearings). Nonetheless, even under Kirby, the implied consent process should be considered a critical stage of the criminal process.

The right to counsel attaches before trial for the obvious reason that a defendant, standing alone against the state, is put at an unfair advantage. Rights waived, either out of ignorance or through intimidation, because a defendant is denied counsel before trial, gives the state an unfair advantage. See Powell v. Alabama, 287 U.S. 45 (1932). When the pretrial investigation reaches a "critical" stage, the right to counsel attaches. The United States Supreme Court has defined that critical stage as: "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or

informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226 (1967).

Although Kirby and its progeny seem to indicate that, save for the Miranda situation, formal proceedings must be commenced before the right to counsel attaches, such a view ignores the realities of the implied consent situation. The fact that implied consent is labeled a "civil" proceeding is not dispositive. Prideaux, 310 Minn. at 409, 247 N.W.2d at 388. As the state points out, chemical testing is the best evidence for a criminal DWI conviction. In fact, a reading over .10 is positively damning; it is, in essence, a conviction.

The next step for the police is to ticket the suspect. The ticket, in essence a summons to appear in court, is

the functional equivalent of a complaint. Formal proceedings are commenced with the issuance of the ticket and, thus, under Kirby, the right to counsel attaches. However, since the driver is not taken in for testing unless unable to perform field sobriety tests or to pass a preliminary breath test, the officers have probable cause to arrest the driver before the chemical test is given. The ticket could easily be given upon arrival at the station or even out on the highway. The fact that the police happen to follow a procedure whereby formal charging is done only after the chemical test is merely a manipulation of the system. This court said in Prideaux: "[T]he decision whether to take or refuse chemical testing is arguably a 'critical stage' in the driving-under-the-influence proceedings." Prideaux, 310 Minn. at

411, 247 N.W.2d at 389. I agree with the Texas Court of Appeals when they write, "It stretches reason to say this is not a critical stage of the pretrial proceeding." Forte v. State, 686 S.W.2d 744, 754 (Tex. App. 1985).

IV.

Most persons are confused about the many laws that exist. What the public usually understands, and indeed expects, is that if one is in trouble, the first thing to do is consult with a lawyer. That right is so basic, so fundamental, and secured over so many centuries of struggle with tyranny as to become sacred. What kind of message does the majority decision then send out? It says, "Yes, you have the right to counsel, but not until we have all the evidence to convict you." The state

argues that if you permit an attorney to be consulted here, you will have to allow one to be consulted before a search warrant is exercised or before a search of one's auto or clothing can be made pursuant to an arrest. That argument too is false. This case differs because it involves a bodily intrusion.

It is popular today, as it has been over the centuries, to be critical of lawyers, but I must remind the citizens of this state that our legal and judicial system is most unique in a world filled with tyranny and oppression. What makes it unique is that we do have a third branch of government to act as a check and balance on excesses of the executive and legislative branches to protect individuals against tyranny and abuses of those branches. Our constitution was drafted for that purpose. Sometimes

lawyers are prevailed upon to represent unpopular causes and unpopular clients, but because they do so, we are better for it.

I, therefore, resent the implication that consulting one's attorney is a barrier to law enforcement or to removing the drunk driver from the highway. There is not one shred of competent evidence to bolster that argument. Good law enforcement is the result of strong police work, strong prosecutorial services, reasonable rules of procedure, and strong defense counsel. The strength of opposing forces insures honest, efficient and non-dictatorial results.

What the state fails to mention when it claims that, since the 1984 amendments to the law, there have been fewer refusals to take the test is that those amendments also doubled the penalty for

refusing the test. Prior to 1984, a refusal to submit to the test could result in a 6-month suspension of license. After 1984, refusal to take the test resulted in a revocation of a license for 1 year. It is far more logical to conclude, therefore, that it was the increase in penalty rather than the denial in the right to counsel that resulted in the decrease of refusals to take the test.

Moreover, the very argument the state uses is refuted by the facts of this case. Here, the defendant at first refused to take the test and kept insisting on her right to talk with her attorney. When she was permitted to call her attorney, he advised her to take the test! All this was accomplished in less than 30 minutes. Yet, after she had consulted her attorney, the police then

advised her, in effect, "Sorry, you had the chance to take the test. You didn't take that chance so now you can't change your mind. Your license has already been revoked." In all logic, if it is the test result the state wanted, it surely is a distorted way to apply the statute. The state, when confronted at oral argument with the poor logic of its argument, argued, in effect, that it made no difference whether the legislature was logical or illogical: the legislature intended to deny the right to counsel. I disagree.

First, legislative intent is not clear. True, it amended the advisory section of the statute, but it did not amend section 481.10, the source of the right to counsel in an implied consent test. When two statutes can be read in harmony with each other, especially when

we are dealing with such a fundamental right as right to counsel, we can and should interpret the 1984 amendments as still permitting the right to counsel.

Even if the majority is correct that the intent of the legislature is clear and that it intended to deny counsel in the situation presented here, I would then strike down the statute on constitutional grounds. The majority decision cites the United States Constitution and decisions of the United States Supreme Court as pointing in the direction of a decision that there is no constitutional right to counsel in this situation. That position is subject to argument, but even if it is valid, what the majority ignores is that we have our own Minnesota Constitution. A state is free to offer its citizens greater protection in its constitution than is

offered by federal law. This is true whether the words of the United States Constitution and the state constitution are similar or not.

In Prideaux, although deciding the case on statutory grounds, this court clearly stated that it felt the logic of State v. Palmer was no longer valid. We said, "Upon reflection, we have some doubt as to the continuing vitality of these cases." Prideaux, 310 Minn. at 409, 247 N.W.2d at 388. We further said:

> The choice, however, may be a meaningful one to an individual driver. For example, the driver who is requested to submit to chemical testing might not know that he can reasonably refuse the test in certain circumstances where the officer did not have reasonable ground for arrest or for requesting the test, did not properly inform the driver of his rights, or confused the driver as to his rights. State, Dept. of Highways v. Beckey, 291 Minn. 483, 192 N.W.2d 441 (1971). Moreover, depending upon the individual driver's circumstances, the decreased possibility of

criminal conviction may be worth the 6-month loss of his license if he does not depend on his driver's license for his livelihood. If the driver was involved in an accident resulting in death, he might face more serious criminal proceedings in which the test results could be important evidence against him. In the above instances, and others we cannot immediately foresee, a driver requested to submit to testing might want to seriously consider refusing the test. While such situations may be rare, they are certainly not impossible or even highly improbable. When those situations do arise, the driver must make a critical and binding decision regarding chemical testing which will affect him in subsequent proceedings. This decision is just as critical and just as binding as a decision regarding whether to make a verbal statement, which is one zealously protected by current case law. A driver ought to have the assistance of his own counsel in making the decision about whether to refuse testing.

Even in the vast majority of cases in which competent counsel would advise his client to take the test, the valuable right to counsel is not wasted. An arrested driver may be confused, dazed, and suspicious of the arresting officer, not only

> because of the possible influence of alcohol, but perhaps because of injury due to accident, and other reasons. Where the important chemical-testing procedures are not unreasonably delayed or impaired, the driver should have the benefit of the knowledgeable advice of his own counsel, who may assure him that the officer's statements about his rights and obligations are correct. The recognition of such a right will encourage compliance with the chemical-testing procedures in an atmosphere of fundamental fairness.

Id. at 412-13, 247 N.W.2d at 390 (citations omitted).

The majority opinion would, in effect, overrule the spirit and the intent of Prideaux only 9 years after it was written--a shocking capitulation to alleged legislative intent. I again quote the following language from Prideaux:

> We have referred above to a limited right to counsel. Because of the importance of uniformity and clarity in implied-consent procedures, we would indicate specifically the

nature of the right and its limitations. Consistent with this opinion, any person who is required to decide whether he will submit to a chemical test in accordance with § 169.123 shall have the right to consult with a lawyer of his own choosing before making that decision, provided that such a consultation does not unreasonably delay the administration of the test. The person must be informed of this right, and police officers must assist in its vindication. The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and given reasonable time to contact and talk with counsel. If counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel. The above procedure will ensure an adequate opportunity to consult with counsel without in any substantial way delaying the administration of the test. Indeed, counsel for the department concedes in its brief:

> "***True, a certain amount of time is nearly always spent by an arrestee on matters apart from undergoing chemical test procedures while the arrestee remains in his presence. It may be that a suspect's use of a readily available telephone during

tue [illegible] counsel and felt that that would result in more tests and more convictions, it would be dishonest to argue that such a procedure is really an effective cure for drunk driving. If the legislature were really serious in limiting drunk driving, it could [illegible] and honestly deal with [illegible]. Here are just [illegible] of what it could do:

1. Attempt to limit the [illegible] consumption of alcohol rather

[illegible] blood alconol content of
[illegible] even a trace of alcohol
[illegible] indication of a condition
[illegible] ncing the ability of one
[illegible] a violation
[illegible] dW.
[illegible] programs
of this state and advising the
public of the dangers of the use
and abuse of alcohol and its
consequences.

To follow the [illegible] argument to
logical conclusion, suppose the Legisla-
ture passed a law requiring a blood

alcohol test in every case even if it were necessary for officials to bind, gag, and shackle a person. I am horrified by the vision that it presents; yet, that is a possible conclusion. Surely, that is not the image of justice in the United States of America that our nation would like to project. It should be particularly offensive to citizens of this state, a state which has prided itself as being in the forefront in protecting the rights of its citizens. The opinion of the majority is more akin to the laws prevailing in totalitarian states.

Accordingly, I would affirm the court of appeals.

WAHL, Justice (dissenting).

I join the dissent of Justice Yanzka.

STATE

IN Co

Freeborn Count Judge

Janice Nyflot

Appellant,

vs.

Commissioner of Publi afety,

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Filed March 26, 1985
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SYLLABUS

A person arrested for D.W.I. and asked to submit to chemical testing has a right to consult with an attorney prior to testing if it does not unreasonably delay the administration of the test.

Reversed.

Heard, considered and decided by Popovich, Chief Judge, Sedgwick, Judge, and Nierengarten, Judge.

OPINION

POPOVICH, Chief Judge

Appellant Janice Nyflot appeals the trial court's order sustaining the Commissioner of Public Safety's revocation of her driving privileges for refusing to submit to chemical testing under the implied consent law, Minn. Stat. Sec. 169.123 (1984). Appellant claims she was denied her right to consult an attorney when she was asked to

submit to chemical testing. She was told that under the new 1984 law she had no such right. We reverse and hold that under the 1984 legislation, a right to consult an attorney still exists.

FACTS

Appellant was arrested for D.W.I. about 1:30 a.m. on September 23, 1984 near Albert Lea, Minnesota. As soon as she was arrested, appellant demanded an attorney. She was read the implied consent advisory and when asked if she would submit to the test, she stated she would not do anything until she spoke with her attorney. She was advised that under the new law she no longer had that option. She was told to make the decision on her own and that she could not call an attorney until after she had taken the test or decided not to take the test. Appellant decided not to take the

test. Appellant's driving privileges were revoked. Following her petition for judicial review, the trial court sustained the revocation.

ISSUE

When arrested for D.W.I. and requested to take a chemical test under the implied consent law, does a person have a right to consult an attorney prior to testing?

ANALYSIS

1. The Minnesota Supreme Court recognized a "limited" right to counsel for drivers required to decide whether to submit to a chemical test of blood alcohol content in Prideaux v. State Department of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976). This right to counsel was based on Minn. Stat. Sec. 481.10 and the supreme court's reluctance to believe "the legislature intended a

blanket denial of right to counsel in implied-consent situations." Id. at 414, 247 N.W.2d at 391.

In 1984, the legislature apparently attempted to restrict the right to counsel in implied consent situations; but it changed only the implied consent advisory, which must be read to persons at the time a chemical test is requested, as follows:

> (1) that Minnesota law requires the person to take a test to determine if the person is under the influence of alcohol or a controlled substance;
>
> ~~(1)~~(2) that if testing is refused, the person's right to drive will be revoked for a minimum period of ~~six~~ ~~months~~ one year or, if the person is under the age of 18 years, for a period of one year or until he or she reaches the age of 18 years, whichever is greater;
>
> ~~(2)~~(3) that if a test is taken and the results indicate that the person is under the infuence of alcohol or a controlled substance, the person will be subject to criminal penalties and the person's right to drive may be revoked for a minimum period of 90 days or, if the person

is under the age of 18 years, for a period of six months or until he or she reches the age of 18 years, whichever is greater;

(3) that the person has a right to consult with an attorney but that this is limited to the extent that it cannot unreasonably delay administration of the test nor may it be used to interfere with or obstruct the investigation; and

(4) that after submitting to testing, the person has the right to consult with an attorney and to have additional tests made by a person of his own choosing; and

(5) that if he refuses to take a test, the refusal will be offered into evidence against him at trial.

1984 Minn. Laws ch. 622, Sec. 10[1].

2. The Commissioner of Public Safety claims these changes (1) eliminate a driver's right to consult an attorney before testing, (2) overruled Prideaux and (3) repealed Minn. Stat. Sec. 481.10 as it applies to D.W.I. suspects. There

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[1]Changes or additions are indicated by underline, deletions by strikeout.

are several problems with this argument.

(1) The legislature merely changed the implied consent advisory; it did not change the substantive law the implied consent advisory was based on. Changing what an officer must tell the person does not change the person's rights. The changes may show what the legislature intended to do. Without corresponding substantive changes, however, the advisory is an incorrect statement of the law. The Commissioner of Public Safety argues the legislature did not intend officers give incorrect information to drivers and that such an interpretation of the statute creates an absurd result. See Minn. Stat. Sec. 645.17(1) (1984). However we "cannot supply that which the legislature purposely omits or inadvertently overlooks." Northland Country Club v. Commissioner of Taxation,

308 Minn. 265, 271, 241 N.W.2d 806, 809, (1976). The failure of the legislature to explicitly deny the right to counsel prior to chemical testing prevents us from agreeing with the Commissioner. Minn. Stat. Sec. 481.10 cannot be construed to be repealed by implication. Minn. Stat. Sec. 645.39 (1984).

(2) The new advisory states that after submitting to testing, the person has the right to consult with an attorney. It is unclear whether a person who refuses testing has a similar right. To the average person, this advisory is confusing at best. It is also confusing to tell a person on one hand testing is required, but on the other hand the driver does not have to submit to testing.

(3) Had the legislature intended a blanket denial of the right to counsel,

such denial may be in violation of the constitutional right to counsel before deciding whether to consent to testing. In Prideaux, the court analyzed this issue and concluded there was a constitutional right to counsel, although it declined to rest its decision on constitutional grounds. The constitutional analysis in Prideaux is still viable.

The Prideaux court initially found our implied consent law is:

> necessarily and inextricably intertwined with an undeniably criminal proceeding--namely, prosecution for driving while under the infuence of an alcoholic beverage. * * * Under these circumstances, we cannot see why evidence gathering for prosecution for driving under the influence using implied-consent procedures is any less subject to constitutional scrutiny than other evidence-gathering procedures such as searches, use of informers, or custodial interrogation.

Prideaux, 310 Minn. at 409-10, 247 N.W.2d at 388-89.

Prideaux discussed the devastating impact a six month driver's license revocation may have on an ordinary driver. The Minnesota Supreme Court's statement in Prideaux is equally applicable to the new one year revocation.

3. The crux of Prideaux was its recognition that "the decision whether to take or refuse chemical testing is arguably a 'critical state' in the driving-under-the-influence proceeding." Id. at 411, 247 N.W.2d at 389.

Traditionally, the sixth amendment right to counsel does not attach until a critical stage in the proceeding. See generally Coleman v. Alabama, 399 U.S. 1, 7 (1970).

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him--"whether by way of formal charge, preliminary

> hearing, indictment, information, or arraignment."

Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

> That statement * * * does not foreclose the possibility that the right to counsel may, under some circumstances attach prior to the initiation of judicial proceedings ***.

United States v. Gouveia, ____, U.S. ___, ____, 104 S.Ct. 2292, 2300 (1984) (Stevens, J., concurring) (emphasis added); see Escobedo v. Illinois, 378 U.S. 478, 486 (1964) (sixth amendment right to counsel attaches during interrogation by police). Prideaux recognized that under Minnesota's implied consent law and criminal laws forbidding driving while under the influence, the post-arrest decision dealing with submission to a chemical test may be the most critical of

all states since it virtually determines the outcome of subsequent trials.

The Prideaux court characterized the decision about testing as a critical stage because the driver's consent is a major factor in the State's criminal prosecution against him for D.W.I. By refusing to consent to testing, criminal prosecution may be more difficult. Prideaux recognized the decision is also important to the driver because of the concept of reasonable refusal.

> [T]he driver who is requested to submit to chemical testing might not know that he can reasonably refuse the test in certain circumstances where the officer did not have reasonable ground for arrest or for requesting the test, did not properly inform the driver of his rights, or confused the driver as to his rights. Moreover, depending upon the individual driver's circumstances, the decreased possibility of criminal conviction may be worth the 6-month loss of his license if he does not depend on his driver's license for his livelihood. If the driver was involved in an accident resulting in death, he might face more serious

criminal proceedings in which the test results could be important evidence against him. In the above instances, and others we cannot immediately foresee, a driver requested to submit to testing might want to seriously consider refusing the test. While such situations may be rare, they are certainly not impossible or even highly improbable. When those situations do arise, the driver must make a critical and binding decision regarding chemical testing which will affect him in subsequent proceedings. This decision is just as critical and just as binding as a decision regarding whether to make a verbal statement which is one zealously [illegible] case law. A [illegible]

Even the vast majority [illegible] in which competent counsel would advise his client to take the test, the valuable right to counsel is not wasted. An arrested driver may be confused, dazed, and suspicious of the arresting officer, not only because of the possible influence of alcohol, but perhaps because of injury due to accident, and other reasons. Where the important chemical-testing procedures are not unreasonably delayed or imparied, the driver should have the benefit of the knowledgeable advice of his own counsel, who may assure him that the officer's statements about his

rights and obligations are correct. The recognition of such a right will encourage compliance with the chemical-testing procedures in an atmosphere of fundamental fairness.

[illegible] 412-13, 247 N.W.2d [illegible]. This reason- [illegible] under the 1984 [illegible].

4. The Commissioner argues that under the 1984 legislation, testing is now mandatory and there is no right to refuse testing. As such, the Commissioner asserts the demand for testing is not a "critical stage" and is analogous to other nonconsensual warrantless takings of evidence from a suspect. 1984 Minn. Laws ch. 622, Sec. 13 changed the language from "offering" to "requiring" a test, in Minn. Stat. Sec. 169.123, Subd. 5a where the peace officer is deemed an agent of the Commissioner of Public Safety for purposes of the notice

of revoca[illegible] reflected the legislatu[illegible] intent to make testing "ma[illegible] for those suspected of driv-i[illegible] the information as stated in the [illegible] of chapter 622. However, the [illegible] clouded by discussions of "right t[illegible] refuse."

The legislature retained the concept of refusal, see Minn. Stat. Sec. 169.123, Subd. 4 (1984), and the defense of reasonable refusal. See 1984 Minn. Laws ch. 622, Sec. [illegible] of the refusal to [illegible] admissible in a criminal pr[illegible] for D.W.I. See Minn. Stat. Sec. 169.121, subd. 2 (1984). The nature of a driver's decision whether to submit to testing is still critical and binding.

We cannot take seriously the Commissioner's contention that when a driver is asked to submit to chemical

testing that he is not "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Kirby, 406 U.S. at 689-90. A driver is usually given a charging document (uniform traffic ticket or tab charge) by the officer regardless of the driver's decision about submitting to testing. The advice of counsel at the time a driver is asked to submit to testing is crucial because of the ramifications such a decision entails.

5. The "civil" label attached to implied consent proceedings is not dispositive. Prideaux, 310 Minn. at 409, 247 N.W.2d at 388. In Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979), for example, the Minnesota Supreme Court established a right to counsel in paternity proceedings although a paternity action

is civil. Id. at 344. Likewise, in Cox v. Slama, 355 N.W.2d 401 (Minn. 1984), the court established the right to counsel for persons facing civil contempt for failure to pay child support when incarceration is a real possibility. Id. at 403.

We are aware that our decision is in conflict with decisions in other jurisdictions, but we are persuaded that our result is fundamentally fair and is in accord with the opinions of the Minnesota Supreme Court in Prideaux, Hepfel, and Cox.

DECISION

Even under the 1984 legislative amendments to the implied consent law, any person required to decide whether to submit to a chemical test of his blood alcohol content has the limited right to consult with an attorney of his own

choosing before making the decision, so long as the consultation does not unreasonably delay testing.

Reversed.

Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-636

IN THE

Supreme Court of the United States

October Term, 1985

JANICE MARIE NYFLOT,

Appellant,

vs.

MINNESOTA COMMISSIONER OF PUBLIC SAFETY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

16 pp

QUESTION PRESENTED

Does a person lawfully arrested for driving while under the influence of alcohol have a federal constitutional right to consult with counsel prior to deciding whether to submit to mandatory testing to determine alcohol concentration?

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MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein pursuant to Rule 16 of the Rules of the Supreme Court of the United States on the ground that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

A. The Statute.

This appeal raises the question of the validity of certain provisions of the Minnesota Implied Consent statute, Minn. Stat. § 169.123 (1984).

This statute provides that persons suspected of driving while under the influence ("DWI") may be required to submit to tests of blood, breath or urine to determine their "alcohol concentration."[1] In requiring the person to submit to the mandatory test, the officer is required by Minn. Stat. § 169.123, subd. 2(b) (1984), quoted at page 7 of Appellant's Jurisdictional Statement, to advise the suspect, *inter alia*, that Minnesota law requires submission to the test and that the suspect has the right to consult an attorney and arrange for independent testing after the test.

B. The Proceedings Below.

The facts, as set forth in the decision of the court below, are as follows:

On September 23, 1984, Appellant was lawfully arrested for a DWI violation by sheriff's deputies and taken to the law enforcement center in Albert Lea. There she was read the Implied Consent Advisory form and advised as prescribed by the statute. Specifically, she was told (a) that Minnesota law required her to take a test to determine if she was under the influence of alcohol or a controlled substance; (b) that if she refused, her driving privileges would be revoked for a mini-

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[1] "Alcohol concentration" is a new term increasingly replacing the older and more familiar concept of "blood alcohol content" as the objective of testing. The term has separate and distinct definitions for each substance tested. In Minnesota, the definitions are found in Minn. Stat. § 169.01, subd. 61 (1984).

mum of one year; (c) that if she took a test and the results indicated that she was under the influence of alcohol or a controlled substance, she would be subject to criminal penalties and her driving privileges could be revoked for a minimum of 90 days; (d) that "after submitting to testing" she had the right to consult with an attorney and to have additional tests made by a person of her own choosing; and (e) that if she refused to submit to testing, the refusal would be offered in evidence against her at trial.

Appellant insisted that she be permitted to call her attorney before deciding, but the deputies explained to her that the law had changed and that she did not have the right to do so. She agreed to submit to the breath test, and a deputy began to set up the Breathalyzer instrument. When the instrument was ready, Appellant stated that she would not take the test without first talking to her attorney. One deputy advised her that this was a refusal, and the other began to take down the instrument to put it away.

Appellant was then allowed to call her attorney. After talking with her attorney, she said that she would take the test. A deputy sheriff informed her that she had already refused, and that she could not change her mind.

At trial, Appellant's counsel contended (a) that she had a limited statutory right to counsel under Minn. Stat. § 481.10 (1984), as interpreted in *Prideaux v. State, Department of Public Safety*, 310 Minn. 405, 247 N.W.2d 385 (1976), (b) that the 1984 amendment to the Implied Consent statute did not eliminate that right, and (c) that she had a federal constitutional right to counsel under the Sixth Amendment. The trial court rejected these claims and sustained the revocation.

On appeal to the Minnesota Court of Appeals, Appellant argued that the 1984 statutory amendments did not effectively

eliminate the limited statutory right to counsel recognized in *Prideaux*, and that if it did, the statute violated the Sixth Amendment to the United States Constitution, as well as the Due Process and Equal Protection clauses. The Court of Appeals concluded that although the legislature had apparently intended to eliminate the limited statutory right to pretest consultation with counsel, the amendment was not sufficient to achieve that goal, and that any attempt by the legislature to take away the limited statutory right to counsel would probably violate a person's Sixth Amendment rights.

The Minnesota Supreme Court reversed the decision of the Court of Appeals, holding that persons required to submit to testing under Minn. Stat. § 169.123 (1984) have no right, statutory or constitutional, to consult with counsel prior to submitting to the mandatory test. The decision is reported as *Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512 (Minn. 1985). Appellant appeals that decision.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

This Court previously has been asked to decide the precise question presented in this appeal, and declined review. *See Finocchairo v. Kelly*, 11 N.Y.2d 58, 226 N.Y.S.2d 403, 181 N.E.2d 427, *cert. denied*, 370 U.S. 912 (1962). While the Court has not, in the intervening years, directly addressed the specific issue presented by this appeal, several decisions of the Court inexorably point to the result reached by the Minnesota Supreme Court and the conclusion that no substantial federal question is presented for review. Simply stated, there is no constitutionally-mandated right to counsel prior to mandatory testing for a driver's alcohol concentration.

The fundamental premise of Appellant's right to counsel claim is that the decision whether to submit to testing is a "critical stage" in a DWI prosecution. As stated in *United States v. Wade*, 388 U.S. 218 (1967), a critical stage is the stage at which the assistance of counsel is necessary to protect the person's right to a fair trial. Appellant, and the decisions upon which she relies, misapply that test by construing as a "critical stage" every point at which an important decision with potentially far-reaching consequences must be made. However, in *Wade* the Court prescribed a significantly different analysis. The Court explained that the proper approach is:

> to determine whether the presence of [accused's] counsel is necessary to preserve the defendant's basic right to a fair trial *as affected by his right to meaningfully cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.* [The "critical stage" principle] calls upon us to analyze

> whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and *the ability of counsel to help avoid that prejudice.*

Id. at 227 (emphasis added). Thus, the Court's critical stage analysis focusses not merely on potential consequences, as suggested by Appellant, but on potential prejudice to defendant's right to effective counsel at trial and the necessity for counsel's presence to avoid that prejudice. Application of this analysis to the circumstances of mandatory testing for alcohol concentration can lead only to the conclusion that it is not a critical stage.

The starting point is recognition of the fact that the State is allowed "to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (footnote omitted); *see Schmerber v. California*, 384 U.S. 757 (1966). Because the testing can constitutionally be made compulsory, as it has been in Minnesota, there is no need for consultation with a lawyer for advice on whether or not to consent to testing. Indeed, in *Schmerber* the defendant had consulted an attorney, had refused a blood test based on the attorney's advice, but was tested nevertheless. The Court held that the failure to honor the refusal did not violate the Sixth Amendment right to counsel even though the refusal was based on the attorney's advice. 384 U.S. at 765-66. Furthermore, Appellant as much as concedes that a right to consult with counsel at this stage would not serve the purposes required in critical stage analysis by his argument that no lawyer could ethically advise refusal. *See* Juris. St. at 18.

The invalidity of Appellant's critical stage argument is emphasized by this Court's express statement that "preparatory step[s] in the gathering of the prosecution's evidence," such

as "analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like," cannot properly be characterized as critical stages. *Wade*, 388 U.S. at 227. As the Court explained:

> [T]hey are not critical stages since there is minimal risk that [the accused's] counsel's absence might derogate from his right to a fair trial."

Id. at 228. Appellant has suggested no sound reason for the Court to question that conclusion in the context of mandatory alcohol concentration testing and analysis present here. Accordingly, this case presents no substantial federal question for the Court to consider.[2]

By the perversion of the test proposed by Appellant, the right to counsel would arise at times already specifically rejected by this Court; in *Wade*, the Court explicitly mentioned the taking of alcohol concentration tests, along with fingerprinting and other physical evidence-gathering procedures, as being so different from police interrogations as to "preclude such stages being characterized as critical stages at which the accused has the right to the presence of counsel." *Id.* at 227. However drastic the consequences of submitting for an alcohol test or fingerprinting, it cannot be contended

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[2] The Appellant errs in suggesting that the Minnesota Supreme Court failed to take into account "the only Federal Court pronouncement on this question." *Heles v. South Dakota*, 530 F.Supp. 646 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982), was cited to the courts below. The Minnesota Supreme Court presumably gave due consideration to *Heles* along with all other cases cited by both parties. Presumably the Minnesota Supreme Court agreed with the South Dakota Supreme Court, which held in *Department of Public Safety v. Gates*, 350 N.W.2d 59 (S.D. 1984), that having been vacated, the decision of the federal district court in *Heles* was a nullity with no precedential value whatsoever, even in the judicial district in which it was rendered.

that the police action, or the circumstances under which such evidence was gathered, will adversely affect the person's right to a fair trial.

Moreover, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court concluded that the collection of such evidence is a Fourth Amendment-search and seizure question and does not involve any Fifth Amendment problems which might require the giving of a *Miranda* warning involving the right to counsel. Implicitly, then, in *Schmerber*, and more recently in *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court has agreed that there is no constitutional right to counsel with respect to the decision as to whether or not to accede to the demand for submission to a mandatory alcohol concentration test.

Appellant's contention that implied consent statutes, after this Court's decision in *South Dakota v. Neville*, improperly place drivers in the position where they must decide what evidence will be offered against them at trial without the benefit of counsel is without merit. Appellant has not cited any authority whatever which suggests that any suspect in a criminal investigation has a constitutional right to determine what physical evidence can be used against him. Indeed, the Court's decision in *Schmerber* directly negates that suggestion. The Court upheld the admission of results of blood tests taken over the objection of the suspect based on counsel's advice and expressly rejected a claim that the right to counsel had been violated. In practical terms, the situation is really no different than that of a DWI suspect faced with the decision whether or not to stop in response to a red light, of a bank robber confronted by a police officer demanding that he surrender and give up his weapon and loot, or of a drug suspect ordered to surrender the package of cocaine in his hands.

In each such situation, the person faces a "critical" decision with far-reaching consequences. That decision, however, does not affect the person's right to a fair trial. It is clear that in none of those situations would the suspect be entitled to consult with counsel to decide whether he should accede to the police demand for surrender of the evidence. If there can be no right in such cases, where the evidence is of a type that can be secreted but does not self-destruct, no sound reason has been suggested why any such right should be granted where the evidence is as ephemeral in nature as a person's constantly changing alcohol concentration.

All fifty states have implied consent statutes. In the overwhelming majority of those states, the question of whether there is a federal constitutional right to the advice of counsel regarding the decision on whether to submit to testing has been answered in the negative. More than three dozen states have rendered decisions rejecting the position of the Appellant. Only Vermont has a decision from its highest court holding that a Sixth Amendment constitutional right to counsel exists regarding testing, and that decision appears to ignore the clear language of the decisions of this Court. Maryland rejects the Sixth Amendment rationale, but has found a "due process" right to counsel. Oregon rejects all of those theories, but has developed a unique "liberty interest" theory to find a 14th Amendment right. Thus, only four[3] states have found

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[3] Texas has an intermediate appellate decision that agrees with the Vermont decision. *Forte v. State*, 686 S.W.2d 744 (Tex.Ct.App. 1985). That decision, however, from the appellate court at Fort Worth, is contradicted by a more recent decision from the Court of Appeals at Houston, and is not final. *See McCambridge v. State*, No. 01-84-0507-CR (Tex.Ct.App. filed Aug. 29, 1985). Further review of the *Forte* decision by the Texas Court of Criminal Appeals was granted on October 23, 1985.

some pretesting right to counsel, whereas all other states that have considered the question have rejected any claim of a constitutional right to counsel prior to submitting to testing.

The suggestion that the decision of this Court in *Berkemer v. McCarty*, —— U.S. ——, 104 S.Ct. 3138 (1984) creates an impossible conflict is clearly without merit. In *Berkemer*, the Court held only that DWI suspects are entitled to a *Miranda* warning prior to any custodial interrogation. It did not suggest that all prior decisions holding that implied consent test demands are not "interrogations" are now invalid. Moreover, the facts in this case do not present the situation in which there may be confusion engendered by giving a *Miranda* warning followed by a test demand containing information that there is no right to counsel. In Minnesota, such potential problems have been avoided for many years by a procedure under which any custodial interrogation of a DWI suspect is delayed until after the testing process has been completed.

Finally, Appellant's argument that the officer's refusal to give her a second chance to submit to testing after she had once refused thwarts the will of the legislature obviously is not a federal or constitutional question. This contention also has not proved persuasive to the Minnesota Supreme Court, which has recognized that the Minnesota Legislature did not intend to obtain test samples no matter how much time the person delays compliance; rather, the Legislature manifested an intent to have samples provided promptly, with sanctions for noncompliance and a prohibition against administering tests when the person has refused.

CONCLUSION

Based upon the foregoing, Appellee respectfully submits that this appeal presents no substantial federal question and moves the Court to dismiss the appeal.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

JANICE MARIE NYFLOT *v.* MINNESOTA COMMISSIONER OF PUBLIC SAFETY

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

No. 85-636. Decided December 16, 1985

The appeal is dismissed for want of a substantial federal question.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, dissenting.

Shortly after 1:30 a.m. on the morning of September 23, 1984, appellant Janice Nyflot was arrested for driving under the influence of alcohol. She immediately requested that she be allowed to speak with an attorney, but this request was denied. She was then taken to the local law enforcement center. There, she was advised that state law required that she be tested to determine if she was under the influence of alcohol or a controlled substance and that refusal to allow such a test would result in her driver's license being revoked for a minimum of one year. She was further advised that refusal to take the test could be offered in evidence against her at trial. Finally, she was told that if she consented to the test and the test indicated that she was under the influence of alcohol or a controlled substance, she would be subject to criminal prosecution and her right to drive could be revoked for a minimum of 90 days. And she was advised that she had the right, *after* submitting to the testing, to consult with an attorney and to have additional tests done by someone or her own choosing. These admonitions complied with the advice requirements of the State Implied Consent Statute. See Minn. Stat. Ann. § 169.123, subd. 2(b) (West 1985).

After being thus advised, Nyflot informed the police officer that she would not submit to testing without first speaking to an attorney. She was again told that she would not be al-

lowed to speak with an attorney before deciding whether to take the test. She again declined to consent to the test. The police officer then informed her that she had effectively refused the test and allowed her to contact her attorney. Immediately after contacting her attorney, she indicated her willingness to take the test, but she was told that she had been deemed to have refused it and could no longer consent. Her license was then revoked for one year based on her refusal.

The state trial court upheld the revocation against Nyflot's challenge that she had a right to counsel for the purpose of determining whether to consent to the blood alcohol test, which right had been unconstitutionally denied. The Minnesota Court of Appeals reversed, holding that a limited right to counsel was provided by state law. 365 N. W. 2d 266 (1985). The Minnesota Supreme Court, with two Justices dissenting, reversed again and upheld the revocation. 369 N. W. 2d 512 (1985).

The Minnesota Supreme Court first rejected the Court of Appeals' conclusion that a right to counsel in this situation was provided by state law. Then, turning to Nyflot's federal constitutional challenge, the Court held that no Sixth Amendment right to counsel extended to the decision whether to consent to testing. The Court reasoned that *Kirby* v. *Illinois*, 406 U. S. 682 (1972), concluded "that the Sixth Amendment right to counsel did not attach until judicial proceedings are formally commenced (by indictment, complaint or substitute for complaint)." 369 N. W. 2d, at 516. See also *United States* v. *Gouveia*, —— U. S. —— (1984). Although acknowledging that this Court has recognized exceptions to this rule for the purposes of protecting a defendant's Fifth Amendment rights, see, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Minnesota Supreme Court concluded that this Court "is unlikely to find other situations requiring a triggering of the right to counsel before the formal initiation of a criminal prosecution" and that "[i]t is also clear that the

right to counsel recognized in *Miranda* does not apply to the limited questioning of a driver to determine if he will consent to a chemical test." 369 N. W. 2d, at 516 (citing *South Dakota* v. *Neville*, 459 U. S. 553, 564 n. 15 (1983)).

Nyflot now appeals, claiming that she had a Sixth Amendment right to counsel with respect to the decision whether to consent to the blood alcohol test. She asserts that in the special context of a driving-while-intoxicated offense, formal proceedings must be considered to have commenced with the issuance of a traffic ticket, which is in essence a summons to appear in court and the functional equivalent of a complaint. Since the ticket could be given *before* the test (because the driver is not taken in for testing unless she is unable to pass field sobriety or breath tests), the actual police procedures may not be manipulated so as to change the time when adversary proceedings are considered to have begun. Thus, adversary proceedings should be deemed to have been initiated before the test. The right to counsel having attached, Nyflot then argues that the decision whether to consent to the test is a "critical stage" in the proceeding, since it in essence is a decision as to what type of evidence will be available to be used against the driver—the results of the test or the refusal to consent to it. See *Gouveia*, *supra*, —— U. S., at ——.

Most of the courts that have considered this issue have rejected the argument that the Sixth Amendment right to counsel covers the stage at which the decision whether to consent to the blood alcohol test must be made. See, *e. g.*, *Sites* v. *State*, 300 Md. 702, 711, 481 A. 2d 192 (1984) (collecting cases). A few, however, have found that the Sixth Amendment right to counsel does extend to this stage. See, *e. g.*, *Heles* v. *South Dakota*, 530 F. Supp. 646 (D. SD), vacated as moot, 682 F. 2d 201 (CA8 1982); *Forte* v. *State*, 686 S. W. 2d 744 (Tex. Ct. App.), review granted by Tex. Ct. Crim. App., October 23, 1985; *State* v. *Welch*, 135 Vt. 316, 376 A. 2d 351 (1977) (superseded by state statutory right to

counsel, see *State* v. *Duff*, 136 Vt. 537, 394 A. 2d 1145 (1978)). Other courts have found a right to counsel based on state law, see, *e. g.*, *State* v. *Fitzsimmons*, 94 Wash. 2d 858, 620 P. 2d 999 (1980), or on general due process guarantees, see, *e. g.*, *State* v. *Newton*, 291 Or. 788, 636 P. 2d 393 (1981) (en banc plurality).

Given these varying results, I would note probable jurisdiction to settle the question presented.